

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ESTATE OF JOHN T. HARRINGTON	:	DETERMINATION
	:	DTA NO. 818226
for Redetermination of a Deficiency or for Refund of New York State Personal Income Tax under Article 22 of the Tax Law for the Year 1995.	:	

Petitioner, Estate of John T. Harrington, Christine Harrington, Executrix, 67 Hilton Avenue, Apt. C-19, Garden City, New York 11530, filed a petition for redetermination of a deficiency or for refund of New York State personal income tax under Article 22 of the Tax Law for the year 1995.

A small claims hearing was held before James Hoefer, Presiding Officer, at the offices of the Division of Tax Appeals, 175 Fulton Avenue, Hempstead, New York, on September 12, 2001 at 1:15 P.M. Petitioner appeared by Mark J. Brosnan, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Thomas M. Luka).

The parties were allowed time to file briefs in this matter. The final brief was due on February 15, 2002 and it is this date that commences the three-month period for the issuance of this determination.

ISSUE

Whether petitioner, a nonresident of New York during 1995, is properly entitled to claim a 1995 partnership loss from Witherbee Associates for New York State tax purposes.

FINDINGS OF FACT

1. John T. Harrington¹ and Christine Harrington were married on September 30, 1995. For the taxable year 1995 petitioner and his spouse each filed separate Federal income tax returns under filing status “Married filing separate return.” During 1995 both petitioner and his spouse were residents of New Jersey. Petitioner, whose 1995 New York State income is the subject of this proceeding, did not file a New York State income tax return for 1995.

2. On his 1995 Federal income tax return petitioner reported on Federal Schedule E a total partnership passive loss of \$101,311.00, which amount was derived from the following partnerships:

<u>PARTNERSHIP</u>	<u>EMPLOYER ID NUMBER</u>	<u>LOSS CLAIMED</u>
Fairway Associates	13-3226599	\$56,148.00
Witherbee Associates	13-3226579	37,109.00
1300 North Congress Associates	65-0110089	<u>8,054.00</u>
Total passive partnership loss		\$101,311.00

3. On April 9, 1999, the Division of Taxation (“Division”) issued a Statement of Proposed Audit Changes to petitioner for the year 1995 wherein it asserted New York State personal income tax due of \$5,519.88, based on the following explanation:

Available information indicates that you received income and/or capital gains for the following partnership(s):
FAIRWAY ASSOCIATES
EIN: 13-3226599

The New York State Tax Law requires a nonresident partner to include in New York income his distributive share of all items of partnership income, gain, loss and deduction derived from or connected with New York sources. (Sections 632 and 637 for tax years 1987 and prior; renumbered sections 631 and 632 beginning in tax year 1988).

A thorough search of our files fails to show a New York State nonresident income tax return filed under your name and social security number for the above year.

¹ John T. Harrington died on May 14, 1998.

Under section 683(c) of the New York State Tax Law, tax may be assessed at any time if no return is filed.

Penalty of 25% for not filing a state tax return within five months of its due date has been applied. (Section 685(a)(1) of the New York State Tax Law).

A negligence penalty of 5% is imposed as an addition to tax under section 685(b)(1) of the New York State Tax Law.

In addition to the 5% negligence penalty, an amount equal to 50% of any interest due on a deficiency or portion of a deficiency attributable to negligence or intentional disregard of the Tax Law has been imposed (section 685(b)(2) of the New York State Tax Law).

4. On June 3, 1999, the Division issued a Notice of Deficiency against petitioner asserting New York State personal income tax due for 1995 of \$5,519.88, plus interest of \$1,458.17 and penalties of \$2,385.02, for a total due of \$9,363.07.

5. Subsequently, petitioner's spouse, as the administratrix of his estate, filed a Request for Conciliation Conference with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). Her basis for disagreement with the deficiency was stated thereon as follows:

John T. Harrington was not a resident of the State of New York until approx July 1996. Although we were married in late 1995, we each filed separate income tax returns for 1995 under filing status of Married Filing Separately. I am totally unfamiliar with his income and expenses during 1995, and any income tax obligation he might owe to New York State. John T. Harrington passed away at age 51 on May 14, 1998. Although I dispute that I am responsible financially for the amount claimed to be due since I had no knowledge of the income to which it relates, please send me the April 9, 1999 computation of the amount allegedly due.

6. As the result of a conciliation conference held June 21, 2000, the BCMS conferee issued a Conciliation Order on September 15, 2000 which reduced petitioner's 1995 New York State tax liability to \$2,470.64. This reduction was based on the Division's allowance of a Fairway Associates ("Fairway") 1995 net loss from rental real estate activities and a prior year loss carryover against Fairway's 1995 net gain under IRC § 1231, yielding a net taxable partnership

income from Fairway of \$34,979.00. Additionally, pursuant to the Conciliation Order, all penalties were canceled. With the adjustments made by BCMS there is now no dispute between the parties concerning the computation of net New York taxable income earned by petitioner from Fairway in 1995. However, it is argued that petitioner is properly entitled to offset said income by a net 1995 New York State partnership loss derived from Witherbee Associates (“Witherbee”) of \$28,505.00.

7. On December 14, 2000, Christine Harrington, filed a petition for a hearing with the Division of Tax Appeals respecting the Estate of John T. Harrington. It was stated therein that:

The taxpayer, John T. Harrington (the “Taxpayer”), timely filed his 1995 federal and New Jersey State personal income tax returns as a married filing separate taxpayer.

The Taxpayer died on May 14, 1998.

The Taxpayer’s spouse, Christine Harrington, was appointed as the Administratrix of the Taxpayer’s estate. After waiting seven (7) months from the date of her appointment as Administratrix, pursuant to New York State Surrogate’s Court Procedure Act §1802, the Administratrix distributed the Taxpayer’s estate according to the provisions of his Will.

The original Notice of Deficiency dated April 9, 1999 (the “Notice”), indicated New York State tax due for the calendar year 1995, in the amount of \$5,519.88.

The Notice was based upon the Taxpayer’s share of passive income from Fairway Associates, a New York limited partnership, for which he did not file a New York State income tax return.

On October 4, 1999, the Administratrix filed a request for a conciliation conference to review the tax assessment (the “Conference”). Said Conference was conducted on June 21, 2000 by Thomas E. Drake, Conferee (the “Conferee”). At the conciliation conference, the Administratrix presented to the Conferee information pertaining to the Taxpayer’s 1995 calendar year net loss and prior year loss carry over from Fairway Associates.

Additionally, the Administratrix presented the Conferee with information pertaining to the Taxpayer’s 1995 calendar year net loss and prior year loss carryover from another New York State limited partnership, Witherbee Associates, in which Taxpayer was a limited partner.

A reconciliation of the Taxpayer's income and loss from the New York State limited partnerships as follows:

Fairway Associates:

1995 net income	\$91,127
Less: 1995 net loss	(8,006)
Less: prior year loss carryover	(50,532)
Net Income	\$33,589 ²

Witherbee Associates:

1995 income	\$10,184
Less 1995 net loss	(1,783)
Less prior year loss carryover	(36,906)
Net Loss	(28,505)

Accordingly, the Taxpayer's actual net income from his New York State limited partnership interest for the calendar year 1995 was \$4,084 (i.e., \$33,589, less \$28,505).³

The Conciliation Order dated September 15, 2000, issued by the Conferee failed to take into account the Taxpayer's loss carryover and calendar year 1995 net loss from Witherbee Associates.

Additionally, as the Taxpayer's estate has already been distributed there are no assets from which to pay the remaining income tax liable [sic]. Furthermore, since the Taxpayer's filing status was married filing separately, the Taxpayer's spouse is not liable to pay the Taxpayer's income tax liability, if any, for the year 1995.

8. The Division has no record of a 1995 New York State partnership return being filed by Witherbee.

9. Petitioner's representative was allowed additional time subsequent to the hearing to submit documentation establishing that the claimed 1995 Witherbee partnership net loss of \$28,505.00 should properly be allowed. The documentation submitted thereafter consisted of

² The result of this computation is \$32,589.00 not \$33,589.00 as stated. However, there is no dispute that for the 1995 tax year Fairway generated \$34,979.00 of income taxable to New York State

³ This computation results in \$5,084.00 not \$4,084.00

both a 1995 U.S. Partnership Return of Income, Form 1065 and a 1995 New York State Partnership Return, Form IT-204. On both of these returns, the legal name of the partnership was reported as “Witherbee Court Associates.” The employer identification number was reported on both of these returns as 13-3321797.

10. In response to the aforesaid submission, the Division’s representative, on January 16, 2002, submitted a letter wherein he stated that “We have reviewed the letter and documents sent to us by Mr. Brosnan. In our review it was noticed that the federal ID # of the partnership return provided and the federal ID # of the K-1 shown on sch. E of 1995 does not match. So we recommend to sustain the assessment for the year 1995.”

11. Petitioner had until February 15, 2002 to respond to the Division’s letter brief dated January 16, 2002; however, no reply brief was filed.

CONCLUSIONS OF LAW

A. Petitioner has submitted insufficient documentation to show that he was properly entitled to offset the 1995 Fairway partnership income by a 1995 Witherbee partnership loss. Initially, it is noted that the 1995 Federal and New York State partnership returns submitted subsequent to the hearing report a different partnership name and employer identification number (Witherbee Court Associates, # 13-3321797) than those reported on petitioner’s 1995 Federal Schedule E (Witherbee Associates, #13-3226579). It is clear from the 1995 partnership returns submitted that Witherbee Court Associates, # 13-3321797, was a New York real estate partnership and that, in 1995, petitioner’s distributive share of net loss from real estate activities was \$1,783.00, while his distributive share of a net gain under IRC § 1231 totaled \$10,184.00. However, there is no evidence in the record before me to substantiate that Witherbee Court Associates, # 13-3321797, had a prior year loss carryover of \$36,906.00 as alleged in the

petition. Accordingly, it cannot be found that petitioner has sustained his burden of proof (Tax Law § 689[e]) to show that he had a net loss from Witherbee Court Associates, # 13-3321797, of \$28,505.00 for the 1995 tax year. Furthermore, petitioner has adduced no evidence whatsoever to document the partnership loss of \$37,109.00 from Witherbee Associates, #13-3226579, as reported on Federal Schedule E for 1995 or that this partnership loss was derived from or connected with New York State sources.

B. I reach no conclusions with respect to the argument that Mrs. Harrington is not liable for the deficiency herein because she and Mr. Harrington filed separate Federal returns for 1995 and also due to the fact that the assets of the estate had previously been distributed. It must be pointed out that the issue in this matter is whether a claimed partnership loss from Witherbee is properly deductible by petitioner in the computation of his individual New York State personal income tax liability for 1995. Since the Notice of Deficiency was issued only to “John T. Harrington” and not to Christine Harrington, either individually or in her capacity as the administratrix of her deceased husband’s estate, the Division has, at this point in time, made no claim that Christine Harrington is liable for the deficiency due from her deceased husband. Accordingly, since Mrs. Harrington has not been assessed personally for the deficiency due from her deceased husband, it is premature to address this issue in this determination. If the Division issues an assessment against Christine Harrington for the 1995 deficiency due from her deceased husband, she can then avail herself of all protest rights as allowed by statute.

C. The petition of the Estate of John T. Harrington is denied and the Notice of Deficiency dated June 3, 1999, as modified by the Conciliation Order of September 15, 2000, is sustained.

DATED: Troy, New York
May 9, 2002

/s/ James Hoefer
PRESIDING OFFICER